

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WSG 14

Date Signed: September 15, 1978

MEMORANDUM

SUBJECT: Guidance for Regional Review of Variances and Exemptions Granted by the Primacy States Pursuant to the Safe Drinking Water Act

FROM: Alan Levin, Director (signed by Alan Levin)
State Programs Division, ODW (WH-550)

TO: Regional Water Supply Representatives, I-X

An initial draft dated July 13, 1978, of this guidance was circulated among all Regional Water Supply Representatives. A total of six written and verbal comments were received. A careful review of the comments revealed that most of them were helpful and therefore were incorporated in the attached guidance document.

We are sure that, as you get into the actual review process, you are likely to think of some things that may help improve this guidance. We urge you to pass such ideas on to Ranvir Singh as and when they occur to you.

Attachment

NOTE: This guidance was written to apply to the review of variances and exemptions required by the 1976 Act. The principles in it still remain valid.

***Note: Guidance needs to be updated to reflect new V&E rules.**

GUIDANCE FOR REGIONAL REVIEW OF STATE-GRANTED VARIANCES AND EXEMPTIONS

PURPOSE

This memorandum provides guidance for conducting a review of the variances and exemptions that have been granted during a one-year period beginning June 24, 1977 by the States with primary enforcement responsibility for the public water system supervision program under the Safe Drinking Water Act (SDWA).

BACKGROUND

Sections 1415 and 1416 of the Public Health Service Act as amended by the SDWA require the Administrator to complete a comprehensive review of the variances and exemptions granted by the States during the one-year period, beginning on June 24, 1977. This review shall be completed not later than 18 months after the effective date of the National Interim Primary Drinking Water Regulations. This means that the review must be completed on or before December 24, 1978. Additionally, Section 142.22 of the Implementation Regulations requires the Administrator to conduct subsequent reviews of variances and exemptions at least once during each three-year period following the completion of the first review. Hence, the next required review will cover the period June 24, 1978 to June 24, 1981 and will be completed by December 24, 1981.

The purpose and scope of the review has been defined on page 26 of the House Report No. 93-1185 as follows:

The committee contemplates that the Environmental Protection Agency (EPA) will carefully review the variances (and exemptions) which are granted by States to assure that the State has not abused its discretion in granting variances (and exemptions) and has not failed to impose reasonable control measures.... This system of EPA oversight is intended by the Committee to confer maximum responsibility on States which make appropriate efforts to effectuate the purposes of the Act. While some EPA review of State granted variances (and exemptions) from national regulations was deemed necessary by the Committee to assure the effectuation of the national policy, it is not intended that EPA engage in a case-by-case review or substitute its judgment for the well-exercised judgment of a State....

REVIEW PERIOD

The Regional Offices should commence the review as soon as possible but no later than November 24, 1978. The review and a report for each State must be completed by December 24, 1978.

EXTENT OF REVIEW

A case-by-case review of all variances and exemptions was not intended by the Congress. However, the Regional Office should review a sufficient number of variances and exemptions to conclude that the State has not abused its discretion and has not failed to impose reasonable control measures in granting variances and exemptions. Therefore, where possible, it is recommended that at least 20% of the number of variances and exemptions granted by a State, respectively, should be selected randomly for review.

PRE-REVIEW ACTIVITIES

The Regional Office shall publish in the Federal Register a notice of proposed review for each State. The notice shall include:

- i) Information respecting the location of data for variances and exemptions to be reviewed including data and other information concerning new scientific matters having an impact on the variances under consideration.
- ii) Request for comments on the variances and exemptions to be reviewed and on the need for continuing them.

As a pre-review exercise, the reviewers should become familiar with each State's requirements for granting variances and exemptions since some States' requirements, although as stringent, might be different from the Federal requirements.

REVIEW

The review process should consider the validity and EPA acceptability of the following State actions:

A. Determination of no unreasonable risk to health

The basic premise for granting variances and exemptions is that no unreasonable risk to health must result from ingesting drinking water that is subject to a variance or exemption. The Regional Office should carefully review the following to determine the appropriateness and adequacy:

- i) The basis of such determination;
- ii) Sources of information and other back-up materials used for making the determination; and
- iii) Scientific/medical qualifications and experience of the person making the determination.

B. Determination of economics as a compelling factor in granting exemptions

Since granting of an exemption must take into account compelling factors (including economic factors) which prevent the public water system from complying with the maximum contaminant levels and treatment technique requirements of the National Interim Primary Drinking Water Regulations, the Regional Office should review the adequacy and rationale for using such factors as a basis for granting variances and exemptions. No exemption granted by a State can be considered appropriate unless the economic analysis convincingly shows financial hardship on users, and is made a part of the application package. Economic infeasibility of removal of a contaminant must be determined on the basis of a large system and not on the basis of a small system. To do otherwise would be contrary to Congressional intent. Specifically, the Regional Office should seek answers to the following:

- i) Type, relevance and importance of the compelling factor(s); and
- ii) Impact of the compelling factor(s) on the users of a water system if no exemption was granted and the water system was to install necessary treatment facilities.

If the impact is an unreasonable economic burden, the water rate per household in relation to the family income in the service area should be documented.

Where appropriate and necessary, Guidance on Economic Factors for Granting Exemptions (WSG #28-3) may be utilized by the Regional Office as one of the source documents.

C. Timeliness of State actions

Variance and/or exemption requests from water systems must be reviewed and processed on a timely basis. The SDWA establishes time requirements for completion of the various steps in the process of reviewing and granting variances and exemptions. The regional review should reveal the timeliness of various steps taken by the State in granting a variance or an exemption.

D. Compliance Schedule

If the primary enforcement agency grants a public water system an exemption, the agency shall prescribe a compliance schedule within one year of the date the exemption is granted. The regional review should determine if the time schedule, milestone dates and monitoring requirements are appropriate and if the State has taken follow-up action(s) where the compliance schedule has not been met by the water supplier. (NOTE: This provision for compliance schedules was amended by the 1986 Amendments -- schedules must be done at the time the variance or exemption is granted.)

Attachment A provides a checklist for reviewing variances and exemptions.

POST-REVIEW ACTIVITIES

- (a) As soon as the Regional Office has completed the review of variances and exemptions granted by a State and finds that the State has exercised its judgment well in complying with the substantive requirements and has not abused its discretion in granting variances and exemptions, it will promptly notify the State and publish a notice in the Federal Register outlining the results of the review, together with findings responsive to any comments submitted in connection with such review.
- (b) If, however the Regional Office determines that the State has abused its discretion in granting variances and exemptions, or has failed to prescribe compliance schedules or did not impose adequate control measures in a substantial number of cases based on the number of persons affected, the Regional Office shall notify the State about these findings with the following information:
 - (1) Name and location of each public water system with respect to which the findings were made;
 - (2) Specific reasons for findings;

- (3) As appropriate, propose revocation of specific variances or exemptions, or propose revised schedules for specific public water systems.
- (c) On each notice given in (b) above, to the State, the Regional Office shall provide an opportunity for a public hearing.
- (d) Within 180 days of the date of notice to the State in (b) above, the Regional Office shall complete the following:
 - (1) Hold a public hearing, if requested and deemed necessary;
 - (2) Rescind the findings made in (b) above and promptly notify State; or
 - (3) Promulgate with any modifications as appropriate such revocation and revised schedules proposed in the notice given in (b) above and promptly notify the State of such action.
 - (4) Such revocation or revised schedules shall become effective 90 days after the notice to State in (d)(3) above.
- (e) If the State responds by taking corrective action before the effective date of the revocation or revised schedule, the Regional Office shall review the appropriateness and adequacy of State corrective action and take the following action:
 - (1) If the findings made in (b) above become inapplicable, then the Regional Office shall rescind the findings.
 - (2) If the corrective action by State is inadequate and/or inappropriate, the revocation or revised schedule shall become effective on the due date.

Attachment A
Variances and Exemptions Review Checklist

Name and Address of Public Water System

I.D. Number _____

Reviewer

(Name, Title)

I. Variance was granted on _____

Variance to become effective on _____

Reasons

- (a) _____ Public water system cannot meet MCL because of high concentration of naturally occurring.

(name of the contaminant)

- (b) _____ Use of specified treatment technique is not necessary to protect health of persons.

- (c) _____ Granting of variance will not result in an unreasonable risk to health.

(i) Determination made by _____

(Name, Title)

(ii) Qualifications of Determiner _____

(ii) Basis of Determination _____

(Source document, etc.)

(iv) EPA agrees with the determination, Yes _____ No _____

Compliance Schedule

A variance from MCL included a condition that the public water system will comply with the schedule that the State will prescribe.

Yes_____ No_____

Timeliness of Actions

- (i) Notice of opportunity for public hearing on proposed variance was given on _____.
(Before effective date)
- (ii) EPA Regional Administrator was notified on _____.
(Before granting variance)
- (iii) Compliance schedule for MCL was prescribed by the State on _____.
(Within one year of granting)
- (iv) Implementation schedule for control measures was prescribe by the State on _____.
(Within one year of granting)
- (v) Notice of opportunity for public hearing was published on _____.
(Date)
- (vi) Notice of public hearing was published on _____.
(Date)
- (vii) Public hearing was held on _____.
(Date)
- (viii) Public hearing was not held _____
- (ix) EPA Regional Administrator was notified on _____.
(For variance from MCL, before granting variance)

II. Exemption was granted on _____.

Reasons

- (a) _____ Public water system is unable to comply with MCL or treatment technique due to compelling factors (including economic factors).
- (b) _____ The system was in operation on June 24, 1977.

- (c) _____ Granting will not result in an unreasonable risk to health.
- (i) Determination made by _____.
(Name Title)
- (ii) Qualifications of Determiner _____.
- (iii) Basis for determination _____.
(source document, etc.)
- (iv) EPA agrees/does not agree with the determination.

Compliance Schedule

An exemption from MCL included a condition that the public water system will comply with the schedule prescribed by the State.

Timeliness of Actions

- (i) Schedule for compliance with MCL was prescribed by the State on _____.
(Within one year of granting)
- (ii) Schedule for implementation of control measures was prescribed by the State on _____.
(Within one year of granting)
- (iii) Schedule requires compliance with each MCL/treatment technique no later than January 1, 1981 _____ or no later than January 1, 1983 _____ for system intending to join a regional system.
- (iv) An enforceable agreement to become a part of a regional public water system was attached to the application requesting an exemption up to January 1, 1983.
Yes _____ No _____
- (v)
- (vi) Notice of public hearing was published on _____.
(Date)

(vii) Public hearing was held on _____.
(Date)

(viii) Public hearing was not held _____

(ix) EPA Regional Administrator was notified on
_____.
(Before granting exemption)

Review approved by

(Name, Title)